

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

CAL-AGREX, Inc., a California Corporation, ) No. C-07-0964 SC  
Plaintiff, ) ORDER GRANTING  
v. ) DEFENDANT JERRY  
DEE VAN TASSELL, JERRY GOODWIN, and ) GOODWIN'S MOTION TO  
DOES 1 through 20, inclusive, ) DISMISS DEFENDANT DEE  
Defendants. ) VAN TASSELL'S CROSS-  
CLAIM

**I. INTRODUCTION**

Plaintiff Cal-Agrex, Inc. ("Cal-Agrex"), filed its Amended Complaint against Defendants Dee Van Tassell ("Van Tassell") and Jerry Goodwin ("Goodwin") on March 28, 2007. See Am. Compl., Docket No. 16. Van Tassell filed an Answer and Counterclaim on July 6, 2007, asserting a counterclaim against Cal-Agrex and a cross-claim against Goodwin. See Docket No. 38 ("Counterclaim"). Before the Court is Goodwin's Motion to Dismiss Van Tassell's Cross-Claim. See Docket No. 40. Van Tassell did not oppose the motion.

For the reasons stated herein, the Court GRANTS Goodwin's motion and DISMISSES Van Tassell's cross-claim without prejudice.

**II. BACKGROUND**

The underlying facts of this case are described in detail in

1 the Court's recent Order Granting in Part and Denying in Part  
2 Goodwin's Motion to Dismiss Claims 2, 3, and 4 of the First  
3 Amended Complaint. See Docket No. 43 ("First Order") 1-3. The  
4 Court assumes the parties' familiarity with those facts and  
5 addresses here only the facts relevant to the cross-claim.

6 Cal-Agrex entered into a written agreement to purchase 10,000  
7 metric tons of non-fat dry milk powder ("NFDM") from Goodwin and  
8 Van Tassell. See Am. Compl. ¶ 8; Ex. A ("Agreement"). Pursuant  
9 to the Agreement, Cal-Agrex was to deposit \$2,000,000 with Van  
10 Tassell in December 2004, and in return Goodwin and Van Tassell  
11 would commence monthly shipments of NFDM to Cal-Agrex beginning in  
12 January 2005, totaling 10,000 metric tons of NFDM between January  
13 and April of 2005. Id. ¶¶ 9, 10. Van Tassell admits that the  
14 parties made the Agreement, and that Cal-Agrex deposited  
15 \$1,000,000 with him by a series of wire transfers in December 2004  
16 and January 2005. See Counterclaim ¶ 6.

17 Van Tassell alleges that after receiving the wire transfers  
18 from Cal-Agrex, he wired \$1,000,000 to LaBudde to purchase NFDM,  
19 and \$250,000 to the O Bar Cattle Company "pursuant to directives  
20 by Goodwin" under the Agreement.<sup>1</sup> See id. ¶¶ 7-9. Van Tassell  
21 further alleges that in January 2005, he entered into an oral  
22 agreement with Cal-Agrex, pursuant to which he would purchase an  
23 additional 3400 metric tons of NFDM from LaBudde on behalf of Cal-  
24 Agrex, for which he would receive 2 1/2 cents per pound of NFDM  
25 for the 10,000 metric tons included in the Agreement. See id. ¶

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27 <sup>1</sup>Neither LaBudde nor the O Bar Cattle Company is a party to  
this suit.

1       11. Van Tassell states that this 2 1/2 cents per pound was "in  
2 and above his 1/4 of profits he should've received on the original  
3 transaction." Id. Van Tassell alleges that he purchased 3400  
4 metric tons of NFDM from LaBudde and shipped it to Cal-Agrex. Id.  
5 Finally, Van Tassell claims that he did not retain any of the  
6 money he initially received from Cal-Agrex, and that neither Cal-  
7 Agrex nor Goodwin paid him the 2 1/2 cents per pound of NFDM he  
8 was due. Id. ¶¶ 15-17.

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10 **III. LEGAL STANDARD**

11       The Court will treat Van Tassell's cross-claim as an action  
12 for breach of contract.<sup>2</sup> California law governs the contract.  
13 See First Order 4 n.3. "A cause of action for damages for breach  
14 of contract is comprised of the following elements: (1) the  
15 contract, (2) plaintiff's performance or excuse for  
16 nonperformance, (3) defendant's breach, and (4) the resulting  
17 damages to plaintiff." Careau & Co. v. Sec. Pac. Bus. Credit,  
18 Inc., 272 Cal. Rptr. 387, 395 (Ct. App. 1990).

19       Pursuant to Federal Rule of Civil Procedure 12(b)(6), the  
20 court will grant a motion to dismiss if the plaintiff fails "to  
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22       <sup>2</sup>Van Tassell never specifies the legal theory under which he  
23 believes he is entitled to relief. However, like Goodwin, the  
24 Court cannot discern any possible claim other than breach of  
25 contract from the facts alleged. See Mot. 2 n.4. The Court  
26 therefore will proceed as though Van Tassell brought a contract  
27 claim. If Van Tassell intended to bring a claim other than breach  
of contract, the Counterclaim is so vague and ambiguous it is  
impossible to determine what that claim might have been. The Court  
would therefore grant Goodwin's alternative request for relief and  
order Van Tassell to provide a more definite statement of the claim  
pursuant to Federal Rule of Civil Procedure 12(e). As discussed  
below, the outcome would be the same.

1 state a claim upon which relief can be granted." Fed. R. Civ. P.  
2 12(b)(6). When evaluating a motion to dismiss, the court accepts  
3 the facts as stated by the nonmoving party and draws all  
4 inferences in its favor. See Everest & Jennings, Inc. v. Am.  
5 Motorists Ins. Co., 23 F.3d 226, 228 (9th Cir. 1994).  
6 Furthermore, the court must assume that all general allegations  
7 "embrace whatever specific facts might be necessary to support  
8 them." Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521  
9 (9th Cir. 1994). At the pleading stage, the plaintiff "need only  
10 show that the facts alleged, if proved, would confer standing upon  
11 him." Warren v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1140  
12 (9th Cir. 2003). Finally, if the court dismisses a claim under  
13 Rule 12(b)(6), "leave to amend should be granted unless the court  
14 determines that the allegation of other facts consistent with the  
15 challenged pleading could not possibly cure the deficiency."  
16 Schreiber Distrib. Co. v. Serv-Well Furniture Corp., 806 F.2d  
17 1393, 1401 (9th Cir. 1986).

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19 **IV. DISCUSSION**

20 Van Tassell has failed to state a claim for breach of  
21 contract. In the Counterclaim, Van Tassell never alleges the  
22 existence of a contract between himself and Goodwin, the purported  
23 breach of which would be the foundation of his claim. Van Tassell  
24 discusses two contracts: 1) the Agreement to which Cal-Agrex,  
25 Goodwin, and Van Tassell are all parties, and 2) an oral contract  
26 between himself and Cal-Agrex. See Counterclaim ¶¶ 6, 11.  
27 Neither provides any basis for a claim against Goodwin for breach.

1           Although Cal-Agrex, Goodwin, and Van Tassell are all parties  
2 to the Agreement, it is not a contract between Goodwin and Van  
3 Tassell.<sup>3</sup> For a contract to exist, the parties must reach a  
4 mutual agreement that one party will do something in exchange for  
5 consideration from the other. See Cal. Civ. Code §§ 1550, 1595.  
6 The Agreement does not appear to create any obligation between  
7 Goodwin and Van Tassell. That is, Goodwin and Van Tassell are  
8 both on the same side of the Agreement as sellers, each obligated  
9 to deliver NFDM to Cal-Agrex, with Cal-Agrex on the opposite side  
10 of the Agreement as the buyer, obligated to deposit money with  
11 Goodwin and Van Tassell. See Agreement.<sup>4</sup> Van Tassell claims that  
12 he was entitled to one quarter of the profits generated by the  
13 Agreement. See Counterclaim ¶ 14. The Agreement makes no  
14 reference to any payment from Goodwin to Van Tassell. See  
15 Agreement. Nor does the Agreement appear to require either  
16 Goodwin or Van Tassell to provide the other with any goods or  
17 services. See id.

18           The second contract Van Tassell alleges in the Counterclaim  
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20           <sup>3</sup>When considering a motion to dismiss, the court is generally  
21 limited to the allegations in the complaint, without extrinsic  
22 evidence. See, e.g., Hal Roach Studios, Inc. v. Richard Feiner &  
23 Co., 896 F.2d 1542, 1555 n.19 (9th Cir. 1989). However, the  
24 Agreement was attached to and incorporated into the Complaint, see  
Amended Complaint ¶ 8, and subsequently incorporated into the  
Counterclaim. See Counterclaim ¶ 6. The Court may therefore  
consider the Agreement when deciding a motion to dismiss. See Hal  
Roach Studios, 896 F.2d at 1555 n.19; Fed. R. Civ. P. 10(c).

25           <sup>4</sup>For the purposes of resolving this motion, the Court assumes  
26 the validity of the Agreement as a contract between Cal-Agrex on  
the one hand and Van Tassell and Goodwin on the other. Goodwin may  
27 still challenge the validity and construction of the Agreement at a  
later time.

1 is an oral agreement between himself and Cal-Agrex. See  
2 Counterclaim ¶ 11. The oral agreement apparently required Van  
3 Tassell to purchase 3400 metric tons of NFDM, for which Cal-Agrex  
4 was to increase by 2 1/2 cents per pound the price it paid Van  
5 Tassell under the Agreement. Id. However, this 3400 metric tons  
6 of NFDM was in addition to the 10,000 metric tons contracted for  
7 in the Agreement. The oral agreement did not require anything of  
8 Goodwin, and did not offer him any consideration. In short,  
9 Goodwin was not a party to the oral agreement, and Van Tassell  
10 does not allege the contrary.

11 Van Tassell's Counterclaim references two agreements to which  
12 he was a party. However, neither was a contract between Van  
13 Tassell and Goodwin. Where there is no contract, there can be no  
14 breach. Van Tassell has therefore failed to state a claim on  
15 which relief may be granted. Van Tassell may cure this deficiency  
16 by pleading additional facts consistent with those already  
17 alleged.

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19 **v. CONCLUSION**

20 Because Van Tassell did not allege a contract between himself  
21 and Goodwin, he has not stated a claim for breach of contract.  
22 The Court therefore GRANTS Goodwin's motion and DISMISSES Van  
23 Tassell's Counterclaim without prejudice. Because the Court  
24 recently granted Cal-Agrex leave to amend its complaint, see First  
25 Order at 8, the Court now ORDERS as follows:

- 26 1. If Cal-Agrex files a Second Amended Complaint, Van  
27 Tassell may amend his Counterclaim when his response to

1                   the Second Amended Complaint is due.

2       2. If Cal-Agrex does not amend its complaint, Van Tassell  
3                   may file an amended Counterclaim no later than 30  
4                   (thirty) days from the date of this order.

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6                   IT IS SO ORDERED.

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8                   Dated: September 25, 2007

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10                   UNITED STATES DISTRICT JUDGE